No. 96-8422

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In order to convict a person of willfully engaging in the business of dealing in firearms without a license in violation of 18 U.S.C. §§ 922(a)(1)(A) and 924(a)(1)(D), may the jury be instructed that "willfulness" means only that the defendant acted knowingly and purposefully, or must the jury be instructed that "willfulness" means that the defendant knew of the licensing requirement and violated a known legal duty?

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with more than 9,000 members nationwide--along with 78 state and local affiliate organizations numbering 28,000 members--including private defense lawyers, public defenders and law professors.[1] NACDL's mission is to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. It is also committed to preserving fairness within America's criminal justice system. Founded in 1958, NACDL has a long tradition of safeguarding the rights of persons involved in the criminal justice system along with preserving and strengthening our adversary system of justice.

NACDL submits this brief with the consent of the parties. As an association for criminal defense lawyers, NACDL members have a keen interest in the integrity of the jurisprudence in the federal courts concerning scienter standards in all areas of the criminal law.

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[1] No party in this case authored any part of this brief. Printing costs are being paid by NACDL and no other monetary contributions have been made for the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The Gun Control Act, as amended by the Firearms Owners' Protection Act (FOPA), 18 U.S.C. § 924(a)(1), punishes whoever "knowingly" commits certain specified acts and whoever "willfully violates any other provision of this chapter." Included under the "willful" category is § 922(a)(1)(A), which makes it unlawful for a person to engage in the business of dealing in firearms without a license.

Because the statute distinguishes between "knowingly" and "willfully," the latter must include something more than the former. Thus, the willful standard must include knowledge of the law, which in this instance means knowledge of the licensing requirement. As the statutory language is clear, no resort to legislative history is necessary. Nonetheless, the overall legislative history illuminates the legislative intent that "willfulness" assumes violation of a known legal duty.

The original Act had no *mens rea* requirement. A declared purpose of the FOPA amendments was "to correct existing firearms statutes and enforcement policies." The 1982 Senate report stated that "willful violations" were "intentionally undertaken in violation of a known legal duty."

While FOPA had no House report, a House report critical of the FOPA bill acknowledged that under the willfulness standard the prosecution must prove that the defendant knew the requirements of the law. It advocated solely a "knowing" standard.

In the House, the clear choice was between H.R. 4332, the Judiciary Committee bill which had only the "knowing" standard, and the Volkmer substitute, the FOPA bill which also incorporated the willfulness standard. The

FOPA bill prevailed.

The Second Circuit's decision in this case is based on *United States v. Collins*, 957 F.2d 72, 76 (2d Cir. 1992). In holding that willfulness does not require knowledge of the law, *Collins* neither acknowledges that the statute also incorporates a "knowing" standard nor suggests how its construction of "willfulness" as "knowing and purposeful" would differ from "knowing."

Collins makes one mistake after another in its account of the legislative history. It asserts that there were no Senate reports and that the House Judiciary report was the report on FOPA. It claims that a secret "compromise" occurred in which FOPA's proponents acceded to the criticism of the House Judiciary report and of ATF. This is not borne out in the legislative record.

The Third, Fourth, Seventh, Eighth, Ninth, and Eleventh circuits have all construed FOPA's willfulness requirement to require knowledge of the law. *United States v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988); *United States v. Hern*, 926 F.2d 764, 767 & n. 6 (8th Cir. 1991); *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994) *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995); *United States v. Hayden*, 64 F.3d 126, 129 (3rd Cir. 1995); and *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996). The Second Circuit stands alone.

Two of this Court's precedents on the meaning of willfulness in other statutes and the rules of construction set forth in those cases also mandate the interpretation that "willfulness" in FOPA means intent to violate the law. In *Cheek v. United States*, 498 U.S. 192, 201 (1991), this Court held that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known

legal duty.'" Similarly, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), this Court cautioned against treating a willfulness requirement as surplusage, especially when it is an element of a criminal offense. *Ratzlaf* set forth three rules of construction: when the statutory text is clear, contrary interpretations of the legislative history must be disregarded; if "willfulness" is ambiguous, the rule of lenity requires that any doubt be resolved in favor of the defendant; and, while ignorance of the law is normally no excuse, Congress may decree otherwise by adopting a willfulness requirement. Applying these rules, this Court held that "willfulness" means knowledge of, and an intent to violate, the law. These rules of construction require the same meaning of willfulness in FOPA.

In sum, the Second Circuit's view as expressed in *Collins* and followed here goes against the weight of six other circuits. It was decided without the benefit of this Court's decisions in *Cheek* and *Ratzlaf*. It purports to be based on legislative history, but its account of that history is mistaken. Most of all, it fails to conduct the most elementary procedure of statutory construction when it interprets "willful" to mean "knowing," and does not even mention that "knowing" is a separate statutory element for other crimes and thus must mean something different than "willful." This Court should hold that "willfully" in the case at bar means violation of a known legal duty.

ARGUMENT

I. THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY ESTABLISH THAT "WILLFUL" MEANS INTENTIONAL VIOLATION OF A KNOWN LEGAL DUTY

The Gun Control Act of 1968 (GCA), as amended by the Firearms Owners' Protection Act of 1986 (FOPA), 18 U.S.C. § 924(a)(1), punishes whoever "knowingly" commits certain specified acts and whoever "willfully violates any other provision of this chapter . . . ." Included under the "willful" category is § 922(a)(1)(A), which makes it unlawful for any person, "except a . . . licensed dealer, to engage in the business of . . . dealing in firearms . . . ."[2]

The distinguishing statutory language is so clear that this analysis could end here. In a statute that makes "knowingly" an element of some offenses and "willfully" an element of others, the term "willfully" must mean something more than "knowingly." The only additional element of *mens rea* by which "willfully" can be distinguished from "knowingly" is the element of knowledge of the law.

The "knowing" and "willful" standards were inserted by FOPA; the original GCA had no explicit intent standards. Yet it had never been the intent of Congress to discourage the ownership of and transactions in firearms by law-abiding citizens, and thus it was fitting that regulation of otherwise innocent behavior not impose criminal sanctions where no intent to violate the law existed. Accordingly, when enacting

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[2] *See* § 921(a)(11) ("dealer"), (21) ("engaged in the business"), (22) ("with the principal objective of livelihood and profit").

the FOPA reforms, Congress included the following statement of its legislative intent:

> CONGRESSIONAL FINDINGS--The Congress finds that--
> (1) the rights of citizens--
> (A) to keep and bear arms under the second amendment to the United States Constitution;
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
> require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

§1(b), P.L. 99-308, 100 Stat. 449 (May 19, 1986).

As part of the statute, these Congressional findings should serve as a guide for interpretation of the statute's substantive provisions.[3] The general language of these findings that are favorable to firearm ownership and transfers, and the specific explanation that the purpose of FOPA was "to correct existing firearms statutes and enforcement policies," suggest that reforms such as the "willfulness" standard were intended to have real meaning.

The specific language of the statute defining scienter and declaring the Congressional findings would normally suffice to resolve the issue here, and resort to the legislative history would be unnecessary.[4] However, the legislative history here illuminates the reasons for and purpose of the statutory enactment. Additionally, the Second Circuit's analysis is based on a faulty version of the legislative history. Thus, the legislative background is analyzed below.

The first important version of the FOPA bill, S. 1030, would have made all offenses "willful," which was understood to mean the commission of an act with knowledge of its illegality.[5] The 1982 Senate report

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[3] These express findings have been relied on in interpreting the provisions of the GCA as amended. *E.g.*, *United States v. Lopez*, 2 F.3d 1342, 1355 (5th Cir. 1993), *affirmed*, 115 S.Ct. 1624 (1995); *United States v. Marchant*, 55 F.3d 509, 515-16 (10th Cir. 1995); *United States v. Breier*, 827 F.2d 1366 (9th Cir. 1987) (Noonan, C.J., dissenting from denial of petition for rehearing).

[4] *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear").

[5] "'Willful' has generally been defined to require action taken with the knowledge that it is illegal and with a malicious purpose." The Firearms Owner Protection Act: Hearings Before the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st & 2nd Sess. on S. 1030, 102 (1982) (citing

explained the term as follows:

> First, 103(a) inserts the word "willfully" into the general penalty clause contained in 18 U.S.C. 924(a). The purpose is to require that penalties be imposed only for willful violations--those intentionally undertaken in violation of a known legal duty. *United States v. Bishop*, 412 U.S. 346 (1973) and *Pomponio v. United States*, 429 U.S. 10 (1976). Existing law for the most part requires at best a general intent, so that even inadvertent violations, and those made in the best of faith, may be the subject of prosecution. . . . It is moreover designed to provide enforcing agents, prosecutors and courts with a clear delineation of the type of offenders against whom the law is directed. It removes the tendency of statutes permitting conviction for inadvertent violations to "ease the prosecutor's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

Senate Report 97-476, 97th Cong., 2d Sess., 22 (1982).[6]

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cases) (statement of opponent). (Note that early versions of FOPA used the term "Owner" instead of "Owners'.")

[6] Part of the impetus for enacting a willfulness standard was explained by the committee, *id.* at 15, by quoting from *The Right to Keep and Bear Arms*, Report of the Subcommittee on the Constitution, Senate Committee on the Judiciary, 97th Cong., 2d Sess., 20-21 (1982):

> [I]t is apparent that the enforcement tactics made possible by current firearms laws are constitutionally, legally, and practically reprehensible. . . .
>
> The Subcommittee received evidence that BATF has primarily devoted its firearms enforcement efforts to the apprehension, upon technical *malum prohibitum* charges, of individuals who lack all criminal intent and knowledge. . . . Since existing law permits a felony conviction upon these charges even where the individual has no criminal intent or knowledge, numerous collectors have been ruined by a felony record carrying a potential sentence of five years in a federal prison.

The Report of the Subcommittee on the Constitution described S. 1030 as "requir[ing] proof of a willful violation as an element of a federal gun prosecution, forcing enforcing agencies to ignore the easier technical cases and aim solely at the intentional breaches." *Id.* at 23.

In 1984, the new version of the FOPA bill, S. 914, was changed to distinguish offenses as either "knowing" or "willful." The Senate Judiciary Committee report explained that the Administration had expressed concern that "requiring a 'willful' state of mind in some instances could pose legitimate law enforcement problems." S. Rep. No. 583, 98th Cong., 2d Sess., 20 (1985), citing The Federal Firearms Owner Protection Act: Hearing before the Senate Committee on the Judiciary on S. 914, 98th Cong., 1st Sess., 22, 38 (1983). That reference included the Administration's analysis describing "Existing Law" (the Gun Control Act as passed in 1968) as follows: "Willfulness, i.e., knowledge of the requirements of law, not an element of proof for violation." It stated that the previous version of S. 914 "would require proof of 'willful' violations in any prosecution," and that the amended S. 914 "would require proof of 'willful' violation for certain prosecutions and proof of 'knowing' violations for

remainder of prosecutions."[7] As is clear, the Administration interpreted the proposed willfulness requirement to make knowledge of the law an element of the offense.

Thus, explained the 1984 Senate report, "the Committee amendment specifies a 'knowing' state of mind with respect to offenses that involve the greatest moral turpitude and danger from a justified law enforcement standpoint." However, contrary to the 1982 report and to the Administration's analysis, the 1984 report then states that "the Committee intends 'willful' conduct to cover situations where the offender has actual cognizance of all facts necessary to constitute the offense, but not necessarily knowledge of the law." Report 98-583, at 20. This last statement appears to be a mistake given the detailed explanation in the previous Senate report and the redundancy that would be created. In any event, after describing the "knowing" offenses, the report adds:

> The willful state of mind applies to all other offenses. These were determined to be generally more regulatory in nature, and warranted a higher state of mind to avoid the application of criminal penalties in inappropriate circumstances. These include purely record keeping offenses and others which, from a legitimate law enforcement standpoint,

[7] On behalf of the Administration, Robert E. Powis, Deputy Assistant Secretary (Enforcement), Department of the Treasury, noted about willfulness that "in the absence of evidence that the defendant had specific knowledge that his conduct violated Federal law, he would not violate the Act" by engaging in certain activities. The "knowing" standard "will ensure that law violators may be prosecuted without the additional unnecessary burden of proving that the defendant knew his acts violated the law." S. 914 Hearings, 48-49.

> do not require less demanding state of mind requirements.

Id. at 21.

When taken up on the Senate floor in 1985, the FOPA bill was designated S. 49. Senator Hatch, floor manager of the bill, stated:

> Those violations generally applicable to persons possessing specialized knowledge of gun laws would require a "knowing" commission of an illegal act. Those regulatory violations susceptible of unintentional commission are governed by the higher "willful" scienter to provide more protection against inadvertent violations.

131 Cong. Rec. S8690 (daily ed., June 24, 1985) (statement of Sen. Hatch). *And see id.* at S9125 (daily ed., July 9, 1985) (statement of Sen. Hatch).

Senate debate made clear enough that "willfulness" meant a specific intent to violate the law. See, *e.g., id.* at S9128 (statement of Senator Sasser, citing cases). A provision that "simple carelessness" was not an offense was dropped because even the weaker "knowing" element did not include carelessness. *Id.* at S9132 (statement of Senator Hatch). S. 49 passed the Senate overwhelmingly with no opposition to the "willful" provision. *Id.* at S9175, S9178.

No hearings on FOPA were held in the House, and no committee report on FOPA was issued by the House. The House Judiciary Committee opposed the bills that became FOPA, H.R. 945 and S. 49, and reported its own bill in opposition to FOPA, H.R. 4332. The House report

accompanying H.R. 4332 has been confused as a report on FOPA. House Judiciary Committee Report 99-495, 99th Cong., 2d Sess. (1986), reprinted in *1986 U.S. Code Cong. & Admin. News* at 1327.

The House report attacked the FOPA bills as follows:

> It appears that the intent of the authors of the "willfulness" requirement of S. 49/H.R. 945 is that the prosecution have to prove that the defendant knew the details of the law, understood that his conduct would violate the law, and intentionally set out to violate the law. . . . Proponents of the willfulness standard argue that the offenses for which the standard would apply are mere regulatory offenses, for which a conscious and specific intent to violate the law should be required.

Id. at 11. Attacking that concept, the report insisted that a person who engaged in the business of selling arms "should not escape prosecution solely on the grounds that the government cannot produce witnesses to whom the defendant admitted knowledge that such conduct requires a federal license, and a determination to violate that law."[8] *Id.*

The House report included ATF's criticism of the FOPA, in part because: "Willfulness may be interpreted to mean knowledge of the requirements of law and the specific intent to violate legal requirements." *Id.* at 19 (using as an example "a nonlicensee's illegal interstate firearms

[8] The arms referred to in the report were hand grenades and machine guns. The report ignored that transfers of these items are subject to the stringent procedures of the National Firearms Act, which has no willfulness requirements. 26 U.S.C. § 5801 *et seq.*

purchases").[9]

The House Judiciary Committee bill, H.R. 4332, would have enacted a "knowing" standard only. The report explained:

> Case law interpreting the criminal provisions of the Gun Control Act have [sic] required that the government prove that the defendant's conduct was knowing, but not that the defendant knew that his conduct was in violation of the law. It is the Committee's intent, that unless otherwise specified, the knowing state of mind shall apply to circumstances and results. This comports with the usual interpretations of the general intent requirements of current law.

H.Rep. No. 495, at 25-26.

H.R. 945, the bill that became FOPA, came to the House floor through a discharge petition. It was embodied in the Volkmer substitute to H.R. 4332, the Judiciary Committee bill, and both were debated simultaneously on the House floor.

Rep. Boehlert asserted that "the provisions relating to

[9] In hearings preceding the House report, ATF counsel Jack Patterson testified that "I would define willfulness as that term is used in this bill to mean [not] only knowledge of the facts and the circumstances surrounding the violation, but knowledge of the requirements of the law as well." Noting the discrepancies in the two Senate reports, Mr. Patterson agreed with the 1982 report, explaining: "If knowledge is interpreted to mean knowledge of the facts, willfulness has got to be something higher . . . ." Legislation to Modify the 1968 Gun Control Act: Hearings Before the Committee on the Judiciary, U.S. House of Representatives, 99th Cong., 1st & 2nd Sess., 1201-02 (1987).

'willful intent' found in the Volkmer substitute are an integral part of our efforts to reform Federal firearms laws." 132 Cong. Rec. H1671 (daily ed., Apr. 9, 1986). However, the discussion was not consistent. Rep. McCollum quoted from Senate Report 98-583 the statement that willfulness included knowledge of all pertinent facts "but not necessarily knowledge of the law." He asked whether this was consistent with Volkmer's intent. Rep. Volkmer replied, "yes, it is identical to the Senate meaning." *Id.* at H1679.

Yet Rep. Hughes, just minutes later, stated that the willfulness requirement would "make it next to impossible to convict dealers, particularly those who engage in business without acquiring a license, because the prosecution would have to show that the dealer was personally aware of every detail of the law, and that he made a conscious decision to violate the law."[10] *Id.* at H1684.

This was undoubtedly an exaggeration. One impetus for FOPA was the tendency of BATF agents to enter gun shows "undercover" and to arrest collectors who sold as few as three guns per year, charging them with engaging in the business without a license. *Id.* at H1652 (statement of Rep. Volkmer). A willfulness requirement in such circumstances would not be onerous. If a BATF agent believed that such a person should have a license, the agent could inform the person of the license requirement. Such notice would promote compliance with the law and, if the law was disobeyed, would serve as the basis of proof of knowledge of the law and a willful violation.

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[10] Rep. Hughes continued that "a dealer would practically have to sign a statement saying that, before committing the crime, he had studied the law, knew that what he had in mind was illegal, and did his damnedest to make sure he violated the law." *Id.*

In the floor vote, the Judiciary-Hughes bill, H.R. 4332, was defeated, while the Volkmer substitute became FOPA. When the Volkmer substitute passed, it then became "H.R. 4332, as passed by the House," while "a similar House bill (H.R. 4332) [the Judiciary bill] was laid on the table."[11] *Id.* at H1753, H1757 (daily ed., Apr. 10, 1986).

The only exhaustive study of FOPA's legislative history found that "it is impossible to avoid the conclusion that Congress was fully aware that its use of 'willfully' in FOPA would require proof that the defendant actually knew of the illegality of his acts." D. Hardy, "The Firearms Owners' Protection Act: A Historical and Legal Perspective," 17 *Cumberland Law Rev.* 585, 652 (1986-1987).

II. THE SECOND CIRCUIT'S ANALYSIS IS BASED ON A FAULTY ACCOUNT OF THE LEGISLATIVE HISTORY

According to the Second Circuit, "willful" essentially means nothing more than "knowing." This would render the term "willful" surplusage. The Second Circuit reaches this conclusion through a faulty analysis of FOPA's legislative history.

United States v. Bryan, 122 F.3d 90, 91 (2d Cir. 1997), which affirmed a conviction of engaging in the business of dealing in firearms without a license, held: "The willfulness element of unlawful sale of firearms does not

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[11] This renaming of the Volkmer substitute as H.R. 4332, which was originally the bill in opposition to Volkmer, is probably why some courts and the *U.S. Code Cong. & Admin. News* mistakenly characterized the House Judiciary report as the report on the Firearms Owners' Protection Act.

require proof 'that defendant had specific knowledge of the statute he is accused of violating, nor that he had specific intent to violate the statute.'" *Id.*, citing *United States v. Ali*, 68 F.3d 1468, 1473 (2d Cir. 1995). *Bryan* then noted that the Second Circuit reads the willfulness requirement to require "only that the government prove that the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act which the law forbids." *Id.*, quoting *United States v. Collins*, 957 F.2d 72, 76 (2d Cir.), *cert. denied*, 504 U.S. 944 (1992).

Collins was the Second Circuit's original decision on point and was the basis for both *Bryan* and *Ali*. *Collins* held that one could be convicted of willfully dealing in firearms without a license without any proof that the defendant knew that a license was required. While deciding that it was error for the trial court not to instruct the jury that willfulness is an element of the offense, the error was harmless because the defendant understood that his sales violated the law. 957 F.2d at 74-77.

The discussion in *Collins* is marred by clear mistakes in its account of the legislative history. It characterizes the House report as "accompanying the 1986 Firearms Owners' Protection Act." *Id.* at 75. To the contrary, the House report opposed the FOPA bills (S. 49 and H.R. 945) and reported H.R. 4332, which had no willfulness standard and was defeated. *Collins* quotes the House report as criticizing the requirement of willfulness in the FOPA bills because that requirement would require proof that the defendant "knew the details of the law" and "intentionally set out to violate the law." *Id.* The *Collins* court proceeds to conclude that, because the House report criticized FOPA's willfulness requirement, the House nonetheless passed the FOPA bill

with its willfulness requirement but intended that the willfulness requirement "was meant to be read broadly to require only that the government prove that the defendant's conduct was knowing and purposeful and that the defendant intended to commit an act which the law forbids." *Id.* at 76. *Collins* gives three reasons for this conclusion, but the reasons do not survive careful scrutiny.

First, *Collins* quotes Senate floor statements that a purpose of FOPA was to redirect law enforcement away from inadvertent and innocent violations and toward violent crime. If anything, these comments demonstrate the intent not to allow a conviction if the person engaged in conduct without the specific intent to violate the law. *Collins* makes no attempt to reconcile its spin on these general comments with the fact that the statute distinguishes between "willful" and "knowing," and indeed *Collins* never even acknowledges that the statute has a "knowing" standard as well as a "willfulness" standard. *Collins* then inaccurately claims that "there was no Senate Report to accompany the bill," *id.* at 76, when in fact there was a 1982 Senate report which states that "willfulness" means violation of a known legal duty.

Second, *Collins* speculates that "a compromise on the willfulness provision can be inferred, since the House Report initially rejected its inclusion in the Act altogether." *Id.* at 76. Presumably FOPA's proponents acceded to the criticism of the House Judiciary leadership by changing the meaning of willfulness (albeit without disclosing that intent to anyone) rather than by deleting that term. This phantom "compromise" never occurred. The House bill championed by Rep. Hughes went down in flames while the FOPA bill managed by Rep. Volkmer won in an up-or-down vote. The choices were clear cut and the debate was tough. There was

no hidden compromise which watered down the meaning of willfulness.

Third, *Collins* notes that ATF had expressed concern that the willfulness requirement would make it difficult to prosecute some cases, adding: "The importance of the ATF's views is evidenced by the Judiciary Committee's decision to append the ATF's statement to the Committee Report." *Id.* at 76. Again, this was the committee report which was critical of the FOPA bill and which reported a bill, H.R. 4332, which the House rejected. Further, the very purpose of FOPA was to make it more difficult to prosecute cases and, indeed, to remove many activities from criminal sanction altogether. The Firearms Owners' Protection Act was intended to protect firearm owners from ATF abuses, not to make them worse. FOPA's preamble declared that "the rights of citizens" under the Constitution "require additional legislation to correct existing firearms statutes and *enforcement policies*,"[12] a clear rebuff to what was considered to be ATF's abusive enforcement of the Gun Control Act. How could *Collins* assume that the supporters of FOPA intended to ease the ATF's path to prosecutions, when FOPA was passed to "correct" ATF's policies?

Finally, *Collins'* interpretation of the willfulness requirement renders the term "willfully" mere surplusage. If the statutory term "willful" really means only "knowing," then what does the statutory term "knowing" mean? For all of these reasons, *Collins* misconstrues the law. *Bryan* merely follows this incorrectly-decided circuit precedent.

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[12] §1(b), P.L. 99-308, 100 Stat. 449 (May 19, 1986).

III. ALL OTHER CIRCUITS TO RULE ON THIS ISSUE HAVE CORRECTLY DECIDED THAT WILLFULNESS REQUIRES KNOWLEDGE OF THE LAW, A CONCLUSION MANDATED BY THIS COURT'S DECISIONS IN *CHEEK* AND *RATZLAF*

A. Initial Post-FOPA Decisions

Not long after passage of FOPA, the circuits began to construe the meaning of "knowing" and "willful" as used in FOPA. In the evolution of this jurisprudence, all circuits, other than the Second, which have addressed the issue--the Third, Fourth, Seventh, Eighth, Ninth, and Eleventh--have concluded that willfulness means violation of a known legal duty.

Observing that the original GCA created strict liability offenses, the Ninth Circuit, in *United States v. Sherbondy*, 865 F.2d 996, 1001 (9th Cir. 1988), decided that under FOPA "'knowingly' does not include knowledge of the law," but it does refer to the acts or omissions which must be known, and "an 'unknowing' act cannot constitute a violation." Id. at 1002. *Sherbondy* explained the legislative background as follows:

> In drafting section 924(a), Congress chose the word "knowingly" precisely because it did not want knowledge of the law to be an element of the offenses. The earliest versions of FOPA required that all offenses be "willful." . . . The Treasury Department, along with various witnesses and members of Congress, objected that, with respect to certain serious offenses, including possession of guns

> by felons, the government should not be required to prove intent to violate the law. . . . In response to this objection, Congress reduced the mens rea requirement for the most serious offenses from "willfully" to "knowingly."[13]

Id. (citations omitted).

In *United States v. Hern*, 926 F.2d 764, 767 & n. 6 (8th Cir. 1991), the Eighth Circuit noted that even the government did not dispute that "'willful' means an intentional violation of a known legal duty." *Id.* (citing House Judiciary Committee report and the term's use in other statutory contexts). Of course, "willfulness and intent need not be proven by direct evidence, but 'may also be proven by circumstantial evidence and frequently cannot be proven in any other way.'" *Id.* at 767 (citation omitted). *Hern* held that sufficient evidence existed in that case that the defendant willfully failed to record firearms transactions.[14] *Id.*

B. This Court's Decisions in *Cheek* and *Ratzlaf* Mandate that "Willful" Be Interpreted to Mean Violation of a Known Legal Duty

This Court then decided two cases which apply

[13] *See United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989) (the knowing standard means "knowledge of the facts constituting the offense").

[14] Given that FOPA's opponents constantly argued that it would be impossible to get convictions with the willfulness standard, it is ironic that *Hern*, the first case to be decided squarely on this issue, upheld the conviction.

directly to the issue presented here. These precedents define "willfulness" as violation of a known legal duty and explain why this interpretation is mandated.

The first of these, *Cheek v. United States*, 498 U.S. 192, 199-200 (1991), analyzed the background of the willfulness requirement in the tax laws as follows: "The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption [that every man knows the law] by making specific intent to violate the law an element of certain federal crime tax offenses." Thus, held *Cheek*, "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'" *Id.* at 201.

In terms of their ever-growing complexity, length, and technical characteristics, the same could be said for the Gun Control Act and its implementing regulations. FOPA's framers were well aware of this and sought to ameliorate it. Indeed, supporters of FOPA made statements similar to the following statement in *Cheek* upholding precedents which:

> construed the willfulness requirement in the criminal provisions of the Internal Revenue Code to require proof of knowledge of the law. This was because in "our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law" and "'[it] is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.'"

Id. at 205 (citations omitted).

This Court's second, and more recent, case on point is *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994), which cautioned against treating a "'willfulness' requirement essentially as surplusage--as words of no consequence. Judges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." Where the "word 'willful' [is] used to describe certain offenses but not others in [the] same statute [it] 'cannot be regarded as mere surplusage; it means something.'" *Id.* (citation omitted).

Accordingly, *Ratzlaf* held that the willfulness requirement of 31 U.S.C. § 5322(a), which prohibits the structuring of bank deposits to avoid reporting requirements, meant the same as used elsewhere in the same subchapter: "both 'knowledge of the reporting requirement' *and* a 'specific intent to commit the crime,' i.e., 'a purpose to disobey the law.'" *Id.* at 141 (citation omitted).

This Court noted in *Ratzlaf*: "There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear." *Id.* at 147-48. Moreover, if the meaning of "willfulness" is ambiguous, the rule of lenity would apply, and "we would resolve any doubt in favor of the defendant." *Id.* at 148, citing, *inter alia*, *United States v. Bass*, 404 U.S. 336, 347-350 (1971), (applying the rule of lenity to a provision of the Gun Control Act), and *Crandon v. United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.").

This Court explained in *Ratzlaf*: "We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge. . . . In particular contexts, however, Congress may decree otherwise." 510 U.S. at 148. Finding that Congress did just that, this Court held that to convict Ratzlaf, "the jury had to find he knew the structuring in which he engaged was unlawful." *Id.*

C. Following *Ratzlaf*, all Other Circuits to Address the Issue Have Held FOPA'S "Willfulness" Requirement to Mean Violation of a Known Legal Duty

Following the guidance of this Court provided in *Ratzlaf*, all other circuits to address the meaning of "willfulness" in FOPA have held that term to mean the intentional violation of a known legal duty.

In an incisive analysis, the Seventh Circuit, in *United States v. Obiechie*, 38 F.3d 309, 310 (7th Cir. 1994), held about the licensing requirement at issue here that "knowledge of the law is an element of the government's proof under section 922(a)(1)(A)." The court appropriately rejected the reading of the legislative history set forth in *Collins*. *Id.* at 312. "The conflicting signals sent by FOPA's legislative history are of lesser importance, however, after the Supreme Court's recent decision in *Ratzlaf* . . . ." *Id.* at 313. *Obiechie* continued: "Our duty under *Ratzlaf*, then, is to construe section 924(a)(1)(D)'s 'willfulness' requirement not by combing FOPA's legislative history for snippets of congressional intent, but by considering the context of the term's use within the overall structure of the statute." *Id.* at 313-14.

Obiechie notes that *Collins* failed to discuss

Sherbondy and *Hern*, was decided before this Court's decision in *Ratzlaf*, and "failed even to note that FOPA applies a 'knowingly' standard to some violations and a 'willfully' standard to others." *Id.* at 315. *Obiechie* held: "The only reasonable distinction between section 924(a)(1)'s 'knowingly' and 'willfully' standards is that the latter requires knowledge of the law." *Id.*

Next came the Fourth Circuit, which in *United States v. Forbes*, 64 F.3d 928, 933 (4th Cir. 1995), decided that "'willfully,' especially in a statute in which Congress simultaneously uses 'knowingly,' connotes a more deliberate criminal purpose, sometimes to the point of requiring a specific intent to violate the law." *Id.*, citing *Ratzlaf*. *Forbes* noted that "Congress deliberately chose to impose the 'willful' and 'knowing' labels on different firearms offenses as a compromise between the positions of lobbyists for gun owners and of officials at the Treasury Department." *Id.* at 933 n. 6.

The Third Circuit, in *United States v. Hayden*, 64 F.3d 126, 129 (3d Cir. 1995), interpreting FOPA, held that "Congress intended 'willfully' to mean that a defendant must know his conduct is illegal." The *Hayden* court noted that the House report criticized the bill for precisely this reason. *Id.* at 130. "Perhaps more persuasive than the legislative history is the statutory context in which the 'willfully' language appears." The court explained:

> In defining "knowingly," courts have almost uniformly rejected arguments that the term requires the defendant know his conduct was unlawful; rather, they have interpreted "knowingly" merely to require that the defendant know he was engaging in the prohibited conduct. . . . In light of the legislative history, it is difficult to understand what more the "willfully" language could require, if not knowledge of the law.

Id.

Accordingly, *Hayden* held that "'willfully' in § 924(a)(1)(D) means the defendant must have acted with knowledge that his conduct was unlawful." *Id.* The court noted that this is hardly an impossible burden for the government. In a prosecution for false statements made on a firearm purchaser form, knowledge of the law may be proven by the fact that the form itself explains the law concerning who may not legally purchase a firearm. A purchaser's certification on the form that he does not fall within a prohibited class, absent mental incapacity or illiteracy, would be sufficient to prove knowledge of the law. *Id.* at 133.

Most recently, the Eleventh Circuit, in *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996), agreed with *Obiechie* that this Court's analysis in *Ratzlaf* applies to FOPA, and rejected *Collins*. Accordingly, *Sanchez-Corcino* held:

> To prove a willful violation of § 922(a)(1)(A), the Government must prove that he (1) was required to have a license in order to deal in firearms, (2) knew that he did not have the requisite license, and (3) nonetheless voluntarily, intentionally engaged in the business of dealing in firearms, knowing that such conduct violated the licensing requirement.

Id. at 554.

The above body of jurisprudence is by no means unprecedented in the area of firearms licensing laws. The Arms Export Control Act, 22 U.S.C. § 2778(c), punishes persons who "willfully" violate the provisions of the Act, including the requirement that a license be obtained to export firearms. It is well settled that this provides "the element of specific intent, which requires the government to prove that the defendant voluntarily and intentionally violated a known legal duty." *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978). As applied to the unlicensed export of firearms, "the term 'willfully,' the *mens rea* element of § 2778, connotes a specific intent requirement." *United States v. Wilson*, 721 F.2d 967, 971 (4th Cir. 1983). *Accord United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828 (9th Cir. 1976). The above body of case law was well developed long before FOPA and would have been known by FOPA's authors.[15]

Lurking behind the government's position in this case is the policy argument that proving specific intent to violate the law makes prosecutions more difficult. Yet that result was the express intent of Congress in enacting FOPA. Congress sought to protect well-meaning and otherwise law-abiding citizens engaged in innocent activities from overzealous prosecutions based on a technical violation of

[15] In *Obiechie*, the defendant had been prosecuted both under the Arms Export Control Act as well as the Gun Control Act. Ironically, the district court had recognized that "willfully" in the Arms Export Control Act meant violation of "a known legal duty to refrain from exporting firearms and ammunition without a license," but found that "willfully" in the Gun Control Act had no such meaning. 38 F.3d at 311. In *Obiechie*, the Seventh Circuit harmonized the two statutes.

law about which the citizen had no knowledge. The government cannot seriously contend that it has an unreasonable burden in pursuing warranted prosecutions in those circuits which interpret "willfulness" to mean violation of a known legal duty.

In sum, the Second Circuit's decisions in *Collins* and in this case are anomalous. The Third, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits have held to the contrary, and their decisions are consistent with this Court's precedents in *Cheek* and *Ratzlaf*. For these reasons, this Court should hold that the term "willfully" as used in the Firearms Owners' Protection Act means violation of a known legal duty.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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